

Fair Political Practices Commission
INTERNAL MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

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Subject: Adoption of Proposed Regulation 18732.5 - Statements of Economic Interests From Filers of Abolished Agencies

I. EXECUTIVE SUMMARY

This memorandum discusses the issue of how statements of economic interests from filers at governmental agencies scheduled to be abolished should be handled. In recent years, the Commission's Technical Assistance Division ("TAD") has received inquiries from persons at state agencies designated to be abolished in reference to how certain statements of economic interests should be handled prior to and following their agency's abolishment. For example, when the Department of Information Technology ("DOIT") was abolished in or about 2002, no procedures were in place for handling statements of economic interests filed by employees prior to, or following, abolishment of the agency. Although TAD has provided general guidance in this area, there is no regulation under the Political Reform Act ("Act")¹ which provides specific guidance in such situations.

The proposed regulation attempts to address the practical problems created when an agency is about to be abolished and its employees, filing officials and filing officers (if still employed) are uncertain as to when, where and how to file, copy, forward, and retain statements of economic interests.

At its July 2005 meeting, the Commission heard pre-notice discussion regarding the proposed regulation and the following issues associated with it:

- Whether the proposed wording was specific enough as to the types of triggering events which would subject an agency and its filers to the regulation;
- Whether the regulation should be addressed more toward filers or agency filing officials;

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109 – 18997, of the California Code of Regulations. All further references to "section" are to the Government Code, and all references to "regulation" are to title 2 of the California Code of Regulations, unless otherwise indicated.

- Whether the two subparts of subdivision (c) might be redrafted to be read more parallel grammatically; and
- Whether the regulation's scope should apply only to agencies scheduled for abolishment within six months or less.

Therefore, at the Commission's request, staff now presents a new version of proposed regulation 18732.5 for adoption.

II. BACKGROUND

Public officials subject to the conflict-of-interest provisions of the Act, including officeholders and certain public employees, as well as candidates for public office, are required to file statements of economic interests ("SEI's") whereby they disclose information regarding their economic interests. (See sections 87200 et seq. and 87300 et seq.)

As of 2002, it was estimated that approximately 100,000 state and local governmental officials and employees were required to file SEI's. The SEI's are signed under penalty of perjury and, once filed, are made available to the public upon request. (Sections 81004, 81008.) The Commission along with other agencies then have the authority to levy penalties (civil, administrative and criminal) when SEI's are not submitted in a timely manner or are found to be inaccurate.

Although SEI's do not directly identify and disclose conflicts of interest, the information provided in them alerts public officials to potential conflicts of interest and provides the monitoring public with the information needed to assess the existence of conflicts of interest between a public official's interests and his or her official duties.

A. SEI Filers and Conflict Of Interest Codes

Every public official falls into one of two categories of SEI filers created by the Act. (See section 82026 [defining "filer"].) The first category of filers, governed by sections 87200 et seq., includes most high-ranking elected officeholders. These 87200 filers (sometimes referred to as "statutory filers") include, for example, elected state officers, judges, members of certain state commissions, heads of local governments, those who manage public investments, and candidates for any of the elected offices in this category. These officials are subject to the most expansive disclosure requirements possible under the Act due to the nature of their duties.

The second category of filers, governed by sections 87300 et seq., covers all other positions in an agency "which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest" (Section 87302(a).) People holding these positions are informally referred to as "designated employees" and their positions are listed in conflict of interest codes, which

every governmental agency in California is required to adopt and promulgate. (Section 87300; see section 82019 [defining “designated employee”].)

Unlike most high-ranking elected officeholder filings, many designated employees are required to make only limited disclosures of their economic interests, depending upon the duties associated with their positions. These positions, and their respective disclosure requirements, are listed in each agency’s conflict of interest code. Conflict of interest codes are to be “formulated at the most decentralized level possible, but without precluding intra-departmental review.” (Section 87301.) Once created, a conflict of interest code is submitted to another agency (called a “code reviewing body”) for review and approval.

The Commission serves as the code reviewing body for all non-judicial state, and multi-county local government agencies. (Section 82011(a).) As of 2002, the Commission was responsible for reviewing the codes of approximately 1,000 such agencies; county boards of supervisors and city councils generally serve as the code reviewing body for approximately 6,000 local agencies. All state, and most local, agencies use regulation 18730 as their model conflict of interest code. Such agencies then supplement the model code with a list of designated employees and the types of disclosures required of each different position.

B. Basic Types Of SEI’s

There are four basic types of SEI’s filed by public officials. The first type of statement filed is called an “assuming office” or “initial” statement. (Sections 87202 [for statutory filers], 87302(b) [for designated employees].)

Once working for an agency, each filer has a continuing obligation to file a second type of statement: the “annual” statement. (Sections 87203 [for statutory filers], 87302(b) [for designated employees]; see regulation 18723 [statutory filers], and regulation 18732 [designated employees].)

Third, when a filer leaves government employment he or she files a “leaving office” statement. (Sections 87204 [for statutory filers], 87302(b) [for designated employees].) Finally, when a filer has misreported information, he or she must file an “amended” statement. (Section 81004.5)

C. How SEI’s Are Handled Once Submitted

Where any particular SEI is filed is dictated by section 87500 in its 15 subdivisions – (a) through (o) – the last subdivision serving as a “catch-all” for those persons not previously mentioned. These 15 categories appear to have nothing to do with whether, for example, an SEI is submitted by a statutory filer or a designated employee, or whether an SEI is an annual statement or an amended one. Instead, where a particular SEI will be filed once submitted by a public official, can vary greatly and depends upon the type of position that person holds and for what type of agency they work.

In most cases, the process is fairly simple. For example, SEI's filed by members of the Commission are filed with the Commission, which then makes and retains a copy and forwards the original to the Office of the Attorney General for further processing. (Section 87500(h).) However, the submission of other types of SEI's are more involved. For example, statewide elected officers file one original SEI with their own agency which makes and retains a copy and forwards a copy to the Secretary of State. The original is then sent to the Commission, which retains the original and sends a copy to the Registrar-Recorder of Los Angeles County and a copy to the City and County of San Francisco. (Section 87500(a).)

The final, "catch-all" provision of 87500, which covers SEI's of those holding positions at most state agencies, states:

"Statements of economic interests required by this chapter shall be filed as follows:

¶...¶

"(o) Persons not mentioned above – one original with the agency or with the code reviewing body, as provided by the code reviewing body in the agency's conflict of interest code." (Section 87500.)

Once a public official files an SEI, it is date stamped and processed by "filing officials" and "filing officers," which can sometimes be the same person or agency. A filing *official* (also referred to as an "agency official") is the person at an agency who is charged with receiving and date stamping the SEI's of persons at his or her agency, and forwarding such statements to a filing officer pursuant to the dictates of section 87500. (See reg. 18115(b).) A filing *official* (who is not also a filing officer) does not review SEI's for timeliness, completeness or accuracy.

A filing *officer* is the person or agency which ensures that SEI's are filed on time, complete, and accurate, and also provides the public access to the SEI's for inspection and review. (Section 81010; see section 82027 [defining "filing officer"]; reg. 18115(a) [duties of filing officers].) A filing officer also promptly notifies non-filers that they are late, notifies filers of inaccurate SEI's of irregularities, and reports apparent violations to the appropriate agencies.

III. PROPOSED REGULATORY ACTION

A. The Problem Currently Not Being Addressed

Currently, the process for handling SEI's (including receipt, auditing for correctness, informing the proper authorities regarding violations, copying, forwarding, etc.) is handled the same for any agency, whether it is about to be abolished or not. The

problem with this is a practical one: when an agency is about to be abolished, many public officials of such an agency are concerned with issues other than the proper completion and filing of SEI's (e.g., wrapping up their work, transferring records to a successor agency, and finding another job – but not necessarily in that order).

As previously indicated, when the Department of Information Technology was abolished in or about 2002, no procedures were in place for handling SEI's filed by employees prior to, or following, abolishment of the agency. Commission staff has worked with the Department of Finance, and other staff, to determine the status of these statements and to complete processing and retention.

A regulation setting out how the statements should be handled would be helpful. In the case of abolished agencies, filers may not know to whom they should deliver their SEI's in an agency whose previously designated filing official and/or filing officer has left for other employment. Other filing officials and/or filing officers may have received certain SEI's, but may not have the staff to carry out the duties for which they are responsible (e.g., the retention of forms, forwarding of forms, reviewing of forms for accuracy, and the pursuit of non-filers or filers of inaccurate forms). Consequently, SEI's from such agencies may be filled out improperly and not amended, not made readily available for public inspection, lost, or not submitted at all. These lapses would hamper and impede penalty enforcement against abolished agency filers, filing officials, and filing officers who have not met their obligations.

Since there is no regulation under the Act which provides specific guidance in such situations, regulation 18732.5 (Statements of Economic Interests From Filers of Abolished Agencies, copy attached) is proposed.

B. The Proposed Solution: Regulation 18732.5 – Statements of Economic Interests From Filers of Abolished Agencies

1. Subdivision (a)

“(a) This regulation specifies the manner in which statements of economic interests, required to be filed with abolished agencies or agencies that are designated to be abolished by legislation or order, shall be handled, including filing, processing and retention.”

Subdivision (a) defines the scope of agencies with which this regulation intends to deal. It has been changed from the originally proposed version of subdivision (a) only to respond to Commissioner Huguenin's suggestion that this subdivision was perhaps too vague about the types of actions that would trigger the abolishment of an agency. The phrase “by legislation or order” has been added.

2. Subdivision (b)

“(b) ‘Successor agency,’ for purposes of this regulation, means the agency specified by legislation or order to retain records of the agency that has been or is designated to be, abolished.”

Subdivision (b) defines “successor agency” for purposes of the proposed regulation so that it may be referred to more easily throughout the regulation. The language of subdivision (b) is based upon the simplified language suggested by Commissioner Downey at the July 2005 meeting. The successor agency, or agency tasked to retain documents of an agency scheduled for abolishment, will be a key entity with which the Commission will have to deal in wrapping up the receipt and handling of SEI’s submitted in the last days of an abolished agency’s life.

3. Subdivision (c)

“(c) Statements required to be filed with an agency for which the Commission is the code reviewing body shall be handled as follows:

(1) At any point over 30 days prior to the abolishment of an agency, statements shall be filed with that agency and forwarded to the successor agency or, if no successor agency is specified, to the Commission. Statements filed under this subsection shall be forwarded by the agency, to the successor agency or the Commission, upon completion of its filing officer duties as specified in subdivision (f) of this regulation. The statements shall not be forwarded any earlier than six months prior to abolishment and no later than the date of abolishment.

(2) Within 30 days prior to, and any time after, the abolishment of an agency, statements shall be filed with the agency to be abolished, the successor agency, or the Commission, as determined by the Commission. If filed with the agency to be abolished, the statements shall be forwarded to the successor agency or the Commission, as determined by the Commission, no later than the date of abolishment.”

Subdivision (c) sets up two time periods in the life (and death) of an agency designated to be abolished, and defines how SEI’s filed during such time periods shall be handled so that a smooth and proper accounting of all SEI’s is accomplished. Consistent with the suggestions made at the July 2005 Commission meeting, the wording of this subdivision has been changed so that the grammatical structure of (c)(1) and (c)(2) are more consistent.

Subdivision (c)(1). At any point over 30 days prior to the effective date of a state agency’s abolishment, subdivision (c)(1) now explicitly directs that statements shall (before any forwarding occurs) be filed with that agency. The explicit directive, that such statements be filed with the agency to be abolished during this time period, was inserted in response to Chairman Randolph’s comments at the July 2005 Commission meeting. Also, the second sentence in (c)(1) now makes it clear that during this period of time the

agency to be abolished has the duty of completing its filing officer duties with respect to such statements before it may forward them to another entity. In other words, the agency to be abolished is responsible for, i.e., receiving, date stamping, reviewing for accuracy, and retaining such statements before forwarding them.

After completion of its filing duties, the agency to be abolished shall forward statements filed over 30 days prior to (but no sooner than six months prior to) its abolishment, to its “successor agency” as defined in subdivision (b). If no successor agency is specified in the directive abolishing the agency, than statements shall be forwarded to the Commission. Subdivision (c)(1) also applies to SEI’s which have been fully processed, potentially years earlier, and were simply being held in the agency’s archives. Any statement “filed,” but not processed by a filing officer (i.e., not reviewed for accuracy, etc.) with the agency over 30 days prior to its abolishment, shall be fully processed by either the successor agency or the Commission, depending upon whether a successor agency has been designated.

It should be noted that as previously written, it was possible that agencies subject to sunset legislation would unnecessarily come within the scope of this regulation within six months of abolishment (old subdivision (a)). This issue was pointed out by Commissioner Huguenin at the last Commission meeting.

For example, an agency might be set to terminate (or be abolished) on January 1, 2006 by operation of legislation passed five years earlier. Further assume that both the Legislature and the Governor fully intended to extend its life another five years but that such life-extending legislation was not going to be signed by the Governor until late September 2005. As previously drafted, the agency in our hypothetical would be unnecessarily subject to this regulation between July 1, 2005 and whenever the Governor signed the legislation extending its life.

Therefore, the current version of this regulation includes language in subdivision (c)(1) that requires a filing officer to fulfill all of his or her obligations at any point over 30 days prior to the abolishment of the agency. In addition, it permits (but does not mandate) forwarding for retention purposes within six months of abolishment. This language allows an agency that may not sunset the discretion to retain documents until its status is certain. For example, in the hypothetical above, an agency that may not sunset could wait until November before forwarding documents. For other agencies, the six-month period ensures a filing officer does not prematurely forward documents to a successor agency, but ensures enough time to plan for the transition.

Subdivision (c)(2). Pursuant to subdivision (c)(2), any SEI’s due within 30 days prior to the abolishment of the agency and thereafter, are to be filed and fully processed by either the agency itself, the successor agency (if one is designated), or the Commission at the Commission’s discretion. SEI’s which are due include: (1) those which are initially due 30 or less days prior to the abolishment of the agency, (2) those which were initially due over 30 days prior to abolishment but were not timely submitted and continue to be due as delinquent statements, and (3) those which are due after

abolishment of the agency. The “as determined by the Commission” language is to allow the Commission flexibility in crafting a plan for the orderly submission and review of SEI’s based upon the particular circumstances (e.g., the size and timing) of the agency being abolished.

A second sentence has been added to (c)(2) in response to comments made by Chairman Randolph at the July 2005 Commission meeting. This new sentence attempts to clarify that if an agency to be abolished receives statements within 30 days of its demise, the agency shall forward them no later than the effective date of its abolishment.

Staff believes the intent of this subdivision is consistent with the Commission’s broad authority under section 83112 to adopt, amend and rescind rules and regulations to carry out the purposes of the Act. One of the stated purposes of the Act provides that “[a]ssets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided.” (Section 81002(c).) The Legislature has also mandated that the Commission “[p]rovide assistance to agencies and public officials in administering the provisions of this title.” (Section 83113(c).)

Based upon this statutory authority, and the problems inherent with an agency that is about to shutdown, Commission staff believes that a code reviewing body has the right and duty to specify how SEI’s should be handled by any agency under its purview that is abolished or about to be abolished. In this case, purposes of the Act are furthered by having a code reviewing body step in to aid an abolished agency, with the orderly submission, review and general handling of SEI’s, when experience has shown that there is a significant chance that process will be disrupted.

Subdivision (c) limits the agencies to be dealt with in this subdivision to only those which use the Commission as their code reviewing body under section 82011(a); i.e., non-judicial state agencies and multi-county local government agencies. First, the problem that TAD has identified is limited to state agencies. State agency SEI’s are largely dealt with by the Commission through its role as code reviewing body for state agencies (and in some cases, filing officer as well).² (See section 82011(a).)

Second, because of the way certain SEI’s are supposed to be filed is so specifically directed by section 87500, it is appropriate for the code reviewing body to specify in a regulation the proper method of handling SEI’s of agencies which are abolished or will be abolished.

² For state agencies, the Commission acts as the filing officer for board and commission members, agency directors and chief deputy directors; for all other designated state employees (other than legislative employees) the agency itself is the filing officer. (See section 87500.)

4. Subdivision (d)

“(d) Statements required to be filed with a local government agency to be abolished and for which the Commission is not the code reviewing body shall be handled as determined by the code reviewing body of the agency to be abolished.”

Subdivision (d) sets out an option by which the SEI’s of a single-county local government agency to be abolished (i.e., for which the Commission is not the code reviewing body) might be handled. With the inclusion of this subdivision, the regulation applies to all government agencies in California, not just those for which the Commission is the code reviewing body (i.e., approximately 1,000 out of an estimated 7,000 agencies). This subdivision does not have the specificity of (c)(1) and (c)(2) because staff felt it would be more appropriate to give local code reviewing bodies the flexibility to determine how these filings should be handled. Some large local jurisdictions, like the County of Los Angeles, may very well handle this in a different manner than other smaller jurisdictions.

5. Subdivision (e)

“(e) Original statements filed prior to or following abolishment of the agency for which the Commission is the filing officer pursuant to Government Code section 87500 shall continue to be filed with and retained by the Commission.”

Subdivision (e) states that SEI’s of those state agency board and commission members, agency directors and chief deputy directors who currently file with the Commission pursuant to 87500 and the conflict of interest codes of nearly all state agencies, procedures will not change. In other words, those officials will continue to file their SEI’s with the Commission, whether their agency is designated for abolishment or not.

6. Subdivision (f)

“(f) Any agency required to receive statements filed under the provisions of this regulation shall perform all applicable filing officer duties as prescribed in Government Code section 81010 and 2 Cal. Code Regs. section 18115.”

Subdivision (f) directs one who receives SEI’s under this scheme to the provisions of the Act which would define their obligations as filing officials and/or officers.

7. Subdivision (g)

“(g) All statements covered by this regulation shall be retained as provided for in subdivision (e) of Government Code section 81009.”

Subdivision (g) indicates how SEI’s processed under this regulation will be kept for a period of at least seven years after they were originally filed.

C. Staff Recommendations

Staff recommends that the Commission approve proposed regulation 18732.5 for adoption.

Attachment

Proposed Regulation 18732.5